

- IV. Prosecutorial efforts to bolster and vouch for the complainants' credibility invaded the province of the jury and denied Mr. Stone a fair trial and due process;
- V. Court error in denying any funding for an expert witness denied Appellant his constitutional rights under the Fourteenth Amendment of the United States Constitution and Article II, § 7, of the Oklahoma Constitution;
- VI. Improper other crimes evidence denied Mr. Stone a fair trial; and
- VII. The cumulative effect of errors denied Appellant of a fair trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that error in Proposition I requires that we reverse and remand Stone's convictions.

To sustain a conviction for lewd molestation to a child under sixteen, the State must prove (1) the defendant knowingly and intentionally (2) looked upon, touched, mauled or felt (3) the body or private parts (4) of a child under sixteen (5) in any lewd or lascivious manner, and (6) the defendant was at least three years older than the child or used force or fear. OUJI-CR 2d 4-129. The instruction given to Stone's jury omitted two of these elements: (1) that the defendant acted knowingly and intentionally, and (2) that he was at least three years older than the child or used force or fear. The parties discussed this omission during the instruction conference, before jurors were instructed. The prosecutor noted there were some missing elements. Rather than include the missing elements, the elements in the existing, incorrect instruction were renumbered 1-4. Stone did not subsequently object to the instruction and has waived all but plain error. *Robinson v. State*, 2011 OK CR 15, ¶ 20, 255 P.3d 425, 433; *Roberts v. State*, 2001 OK CR 14, ¶ 7, 29 P.3d 583, 585; *Neder v. U.S.*, 527 U.S. 1, 15, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35 (1999). Because the error is constitutional, we must determine whether,

beyond a reasonable doubt, the error did not contribute to the verdict. *Neder*, 527 U.S. at 15-16, 119 S.Ct. at 1837.

We review this decision for abuse of discretion, and we will not find an abuse of discretion where, taken together, the instructions accurately state the applicable law. *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. An abuse of discretion clearly occurred here, because two elements were omitted from the instruction on the crime charged in Counts I, II and III.

The State concedes the error occurred, but argues it is harmless. We may find omission of an element of the crime harmless where we conclude, beyond a reasonable doubt, “that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.” *Neder*, 527 U.S. at 16-17, 119 S.Ct. at 1837. We first look at omission of the element requiring that the defendant be at least three years older than the child or used force or fear. There was no claim that Stone used force or fear. Stone did not contest that he was three years older than the victims, and the evidence was overwhelming in this regard. Omission of this element was harmless. *Primeaux v. State*, 2004 OK CR 16, ¶¶ 88-89, 88 P.3d 893, 909.

Omission of the element “knowingly and intentionally” is another matter. The record cannot support a conclusion that omission of this element was harmless. Stone vigorously contested the victims’ claims of sexual abuse. Stone argued that he was playing with C.B. and B.H., and did not touch them improperly. On cross-examination, C.B., describing the encounter, said, “He just like was wrestling both of us,” and “[w]e all started wrestling.” C.B. also said she didn’t know whether the touches were accidental, but they were like a grab rather than a touch. She testified she felt it was more than an accident and she told Stone to get off her. Stone emphasized this testimony, as well as the variances in the victims’ reports of the crimes and the delay in reporting. While the evidence was sufficient to support the convictions, it was not overwhelming. Jurors were not told that Stone had to have touched the girls knowingly and intentionally. We cannot conclude from this record that this omission had no effect on the jury’s verdict. *Primeaux*, 2004 OK CR 16, ¶ 88, 88 P.3d at 909; *Roberts*, 2001 OK CR 14, ¶¶ 15-17, 29 P.3d at 588-89; *Neder*, 527 U.S. at 16-17, 119 S.Ct. at 1837. Stone’s convictions must be reversed and remanded for a new trial with a properly instructed jury.

Stone’s remaining propositions of error are moot.

DECISION

The Judgments and Sentence of the District Court of Pushmataha County are **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PUSHMATAHA COUNTY
THE HONORABLE GARY L. BROCK, SPECIAL JUDGE

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OPINION BY: SMITH, V.P.J.

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LUMPKIN, J.: CONCUR
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